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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No.

TURIDDO SIMONI,
Petitioner,
against
S. GRILL D'IPPOLITO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION IN SUPPORT

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey, entered in the above-entitled case on December 10, 1951.

Opinions Below

No opinion was rendered by the Judge of the Cumberland County Court, sitting in the Probate Division. No opinion was rendered by the Appellate Division of the Superior Court of New Jersey, the case being certified from there to the Supreme Court of New Jersey, on its own motion. The opinion of the Supreme Court of New Jersey (R. 33-36) is reported in 8 N. J. 271.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on December 10, 1951 (R. 37). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3). The following decision sustains the jurisdiction of the Supreme Court to review the judgment on writ of certiorari in this case: *Santovincenzo* v. *Egan,* 284 U. S. 30.

The Federal questions sought to be reviewed herein were initially raised in the court of first instance. By oral argument of petitioner's counsel, the attention of the Surrogate of Cumberland County, New Jersey, was invited to a Consular Convention existing between the United States and Italy, Treaty Series No. 178, Art. XVII. Respondent's claim for letters of administration was predicated on New Jersey Revised Statutes 3:7-6 (now 3A:6-4). Petitioner's cross-claim for letters of administration was predicated on the rights, privileges and immunities conferred and established by said Treaty of the United States in favor of the Italian Consul. The Surrogate of Cumberland County, New Jersey, denied petitioner's said cross-claim and overruled the arguments in support thereof. Only the judgment of the Surrogate appears in the record (R. 29a-30a), no transcript having been made of the proceedings in the Cumberland County Court. This procedural informality is noted in the opinion of the Supreme Court of New Jersey (R. 34).

In the Supreme Court of New Jersey, upon transfer thereto from the Appellate Division of the Superior Court, the Federal questions were again raised in briefs of counsel and in the argument of the appeal. In addition to the above-mentioned Consular Convention between the United States and Italy, the petitioner furnished the Supreme Court of New Jersey with a copy of the Convention between the United States and Costa Rica, dated March 19, 1950, as evincing consular rights of a most-favored nation. The receipt and consideration thereof is acknowledged in the

opinion of the said court (R. 35). The said court further acknowledged its consideration and scrutiny of the Federal Constitution (R. 35) and the Revised Statutes of New Jersey (R. 34, 36).

Petitioner argued, *inter alia,* that under the particular facts of this case, the right to letters of administration afforded him by the aforesaid Treaties was paramount and superior to any interest demonstrated by the respondent; that the local law of New Jersey created no outright preference in favor of the respondent and should therefore be construed so as to give effect to petitioner's Treaty rights; that insofar as said local law of New Jersey might be construed to permit grant of letters to this respondent instead of to the petitioner, the said local law was in clear conflict with petitioner's Treaty rights, and therefore invalid. The Supreme Court of New Jersey passed upon petitioner's said arguments and objections in the manner set forth in its opinion (R. 33-36).

Question Presented

Whether letters of administration on the estate of a decedent, dying intestate in New Jersey and with all next of kin in Italy, shall, more than forty days after death, be granted to the nominee of decedent's undertaker, in preference to the Italian Consul, where (1) applicable Treaties vest primary right to take possession of estate in Consul, subject to be defeated only by persons having superior interests, (2) applicable state law operates in this case to vest primary right of administration in Consul, within forty days of death, and states no preference in favor of any other person thereafter, and (3) local authorities failed to notify the Consul of death and Consul had no knowledge thereof until more than forty days had elapsed.

Statute and Treaties Involved

The pertinent Statutory Provisions and Treaty Provisions are printed in Appendix "A", infra, pp. 13-16.

Statement

Flora Casazza died intestate on December 22, 1950, in Vineland, New Jersey. Her husband had predeceased her and she left no next of kin resident in this country. Her only next of kin were her three sisters and a brother, all residents and nationals of Italy. She left an estate of real and personal property (R. 3a-4a, 33).

At no time did the local authorities notify petitioner, the nearest Italian Consul, of the death of the intestate. More than forty days after death, and on March 16, 1951, one Joseph C. De Marco, a funeral director, and a creditor to the extent of the funeral bill, made application to the Surrogate of Cumberland County, New Jersey, for the appointment of respondent as Administrator of the Estate (R. 33). Notice of the said application, returnable April 20, 1951, was sent to one Luigia Rossi in Genoa, Italy, erroneously alleged to be decedent's next of kin and heir, and a copy thereof was forwarded to the attorneys for the petitioner (R. 4a). This copy is annexed to this petition in Appendix "B" (infra), not having been included in the record herein. Prior to service of this notice, petitioner had no knowledge of the death of the intestate (R. 33).

Immediately and by way of cross-complaint, petitioner made application to the said Surrogate to be appointed Administrator. Later investigation revealed that the notice (Appendix "B", infra) had erred in its recital of Luigia Rossi as next of kin and that the petitioner had inadvertently perpetuated this error in his cross-complaint (R. 1a). The Court was subsequently apprised of the true facts, however, and it is conceded that instead of

Luigia Rossi (a stranger), there are, in fact, three sisters and a brother residing in Italy (R. 34) whose interests this petitioner represents. There is no showing that amended notices of application were ever sent by De Marco's attorney to the said four next of kin.

Both the application of the intestate's undertaker and that of petitioner, the Italian Consul, were presented to the Surrogate of the Cumberland County Court. No testimony was taken and no facts were stipulated. After arguments of counsel, on July 12, 1951, an order was entered, adjudging that letters of administration be granted to respondent, the undertaker's nominee (R. 29a-30a).

An appeal was taken from the above-mentioned order to the Appellate Division of the Superior Court of New Jersey and was thereafter certified to the Supreme Court of New Jersey on its own motion. On December 10, 1951, the Supreme Court of New Jersey affirmed the judgment of the Surrogate appointing respondent as administrator (R. 33-36, 37), by a divided vote of 5 to 2. Chief Justice Vanderbilt and Mr. Justice Heher did not concur in this decision, but dissented and voted for reversal (R. 38).

The opinion of the said Court, by its majority, is set forth herein at pages 33 to 36 of the Record. The majority of the Court held that the applicable treaties conferred no prior or paramount right to letters of administration upon the petitioner, and that the Surrogate of Cumberland County did not abuse his alleged discretion, allegedly vested in him by local law, in appointing respondent, an undertaker's nominee, as Administrator, in place and stead of the petitioner.

Specification of Errors to be Urged

The Supreme Court of New Jersey erred:

1. In holding that the Consular Convention between the United States and Italy, Treaty Series No. 178, does not

give to the Italian Consul a prior and paramount right, in the absence of persons having superior interests, to administer in New Jersey the estates of decedents leaving all next of kin in Italy.

2. In holding that the Consular Convention between the United States and Costa Rica, dated March 19, 1950, Treaty Series No. 2045, does not give to the Costa Rican Consul a prior and paramount right, in the absence of persons having superior interests, to administer in New Jersey the estates of decedents leaving all next of kin in Costa Rica.

3. In holding that the Surrogate of Cumberland County had discretion to appoint respondent as administrator, in preference to the Italian Consul, where respondent was not a person having a superior interest.

4. In failing to hold that the Surrogate of Cumberland County violated petitioner's rights, privileges and immunities, conferred by Treaty, in not granting letters of administration to the petitioner.

5. In failing to hold that the local authorities of the State of New Jersey violated the petitioner's rights, privileges and immunities, conferred by Treaty, in not notifying petitioner of the death of the intestate and in not supplying needed information to petitioner within forty days of such death.

6. In failing to hold that the Surrogate of Cumberland County abused the discretion conferred by state law in not granting letters of administration to the petitioner.

7. In failing to hold that, insofar as state law was construed to deprive Italian Consul of a preference conferred by Treaty, the said state law is invalid and unconstitutional.

8. In affirming the order of the Surrogate of Cumberland County.

Reasons for Granting the Writ

1. The State Courts have here decided a Federal question of substance, purporting to define the operation and effect of recent post-war treaties never before considered by this Court. The last expression of opinion by this Court on the specific issue here involved was in the case of *Rocca* v. *Thompson,* 223 U. S. 317, decided in 1912. In defining the rights of consuls, this Court there looked to a Treaty made with the Argentine Republic in 1853. Since 1853, treaty provisions dealing with Consular Rights to the administration of estates have undergone significant changes in language and context, in the direction of increasing liberalization and enlargement of such rights.

The Treaty with Costa Rica, which this Court is now asked to consider, went into effect in 1950. There is thus a significant gap of nearly 100 years between the last Consular Convention scrutinized by this Court and the one now sought to be placed before it, with respect to the issue of estate administration involved herein. The past 100 years have been crucial ones in the law of nations. Nevertheless, unless judicial review now be had, the rights of consuls, relative to the administration of estates, remain frozen in the archaic and obsolete pattern of 1853 treaty draftsmanship.

The State Courts, moreover, have here denied a right asserted by a foreign and friendly Government; and the right so asserted should be considered and decided by this Court, so that the foreign Government shall not be made to feel that its claims under its Treaty have been denied by the courts of the State with whom its controversy exists, without any consideration thereof by a tribunal of our *National* Government.

This case, moreover, does not stand alone. By virtue of the most-favored-nation clause contained in many treaties, the treaty provisions here in issue are widespread in their application to other lands and countries. Post-war Italy

has proved that it is a staunch friend and ally of this country. The United States has proclaimed its need and desire for closer cooperation and understanding between nations. Judicial review herein by this Court would unequivocally fix and clarify the consular rights of scores of nations, relieving an important source of present tension and misunderstanding.

2. The Treaty with Italy (Appendix "A", infra, p. 13), provides that the respective consuls shall enjoy all the rights and privileges granted to officers of the same grade as the most favored nation.

The Treaty with Costa Rica of 1950 (Appendix "A" infra, pp. 13-16), Article IX, Par. 2(c), provides, *inter alia,* that the consul shall have the right to

> "* * * take possession of the estate or the property unless other persons, *having superior interests,* have taken the necessary steps to assume possession thereof. If under the law of the receiving state, a grant or order of a court is necessary for the purpose of permitting the consular officer to exercise the rights which he is entitled to exercise pursuant to this sub-paragraph such rights shall be recognized by the courts and any grant or order which would have been made in favor of the person whose interests are represented by the consular officer, if he had been present and applied for it, shall be made in favor of the consular officer on his application" (italics supplied).

It is obvious that the above provision establishes a prior and presumptive right to letters of administration in the Consul, subject to be defeated only by persons, *having superior interests,* who have taken the necessary steps to assume possession of the estate. That a Treaty may so provide in unmistakable terms for consular priority in matters of estate administration has been implicitly recognized in this Court in *Rocca* v. *Thompson,* 223 U. S. 317. This Court there cited the Consular Convention between the United States and Sweden of 1910 as an example. It is

submitted that the instant treaty with Costa Rica of 1950 is an even more striking example of unmistakable intent to confer a preference in favor of the Consul.

The above-quoted provision of Article IX of the Treaty with Costa Rica is, indeed, far different from those heretofore considered in this and other Courts. The instant provision gives the Consul the unequivocal right to "take possession" and not merely to "intervene in the possession", as in the case of the Treaty between the United States and Argentina of 1853 (considered by this Court in *Rocca* v. *Thompson,* supra).

The instant treaty, moreover, lacks entirely the qualifying words "comformably with the laws of the country", contained in the aforesaid Treaty with Argentina of 1853 (*Rocca* v. *Thompson,* supra), or the phrase "so far as the laws of each country will permit", as in the Consular Convention between the United States and Sweden of 1910 (*Rocca* v. *Thompson,* supra; considered in *Matter of D'Adamo,* 212 New York 214; cf. *Diamantopoulos* v. *Glekas,* 11 F. 2d 200).

In the foregoing respects, the instant Treaty with Costa Rica is akin to the Treaty between the United States and Persia of 1856, previously noted by this Court in *Santovincenzo* v. *Egan,* 284 U. S. 30. In there upholding the right of the Italian Consul to succession to personalty of an intestate national, as against the claim of the State of New York, this Court stated, at p. 37:

> "The omission from Art. VI of the Treaty with Persia of a clause of this sort [i.e., so far as the laws of each country will permit], so frequently found in treaties of this class, must be regarded as deliberate."

Further evidence of the deliberate nature of this omission herein is found in an earlier Treaty of 1851 with Costa Rica, in which specific words of limitation were there contained, as follows (Art. VIII):

> "If any citizen of either of the two high contracting parties shall die without will or testament in any of

> the territories of the other, the Consul General or Consul of the nation to which the deceased belonged, or the representative of such Consul General or Consul in his absence, shall have the right to nominate curators to take charge of the property of the deceased, *so far as the laws of the country will permit,* for the benefit of the lawful heirs and creditors of the deceased, giving proper notice of such nomination to the authorities of the country" (italics supplied).

The current Treaty with Costa Rica of 1950 eliminates these sweeping words of limitation. Present consular rights of administration are instead made subject to laws and regulations, if any, "providing for, or relating to *war or a national emergency*" (Art. IX, Par. 5). No war or emergency legislation is involved in the instant case. This progressive attenuation of the limiting clause, as it once appeared in earlier treaties with Costa Rica (supra), is clear evidence of the corresponding growth of the consular right of administration (cf. *Matter of D'Adamo,* 212 N. Y. 214).

It is respectfully submitted that the Supreme Court of New Jersey erred in holding that this petitioner did not have a prior and paramount right, conferred by treaty and with due consideration for local law (infra), to administer the estate of the decedent, as against the application on behalf of the respondent.

3. The applicable statutory provision involved herein is contained in New Jersey Revised Statutes 3:7-6 (now 3A:6-4), which provides, *inter alia,* as follows:

> "If such intestate leaves no relations justly entitled to the administration of his personal estate, or if his next of kin shall not claim the administration within forty days after the death of such intestate, the ordinary, or surrogate (now Superior Court or Surrogate's Court—1952 amendment) may grant letters of administration to any fit person applying therefor."

During the first forty days after death, a prior, paramount and exclusive right to letters of administration is thereby vested in the Consul as representative of the next of kin. Treaty with Costa Rica, Art. IX, par. 2(a) and 2(d). After forty days from death, *the statute creates no preference in favor of any other person whatever,* but merely provides that letters may be granted to any fit person applying therefor.

The statute in this respect is far different from any local statute previously considered by this or other Courts. Those decisions which have denied letters of administration to the Consul, in favor of some other person, have almost invariably been predicated upon statutes which expressly created a prior right to administration in such other person.

Thus, local law has variously declared preferences in favor of the public administrator (*Rocca* v. *Thompson,* 223 U. S. 317; *In re Servas,* 169 Cal. 240; *Re D'Agostino,* 88 Misc. (N. Y.) 371; *Re Comparetto,* 88 Misc. (N. Y.) 369; *Re Conde,* 144 Misc. (N. Y.) 357), the County Treasurer (*Re Pandolfo,* 133 Misc. (N. Y.) 582), or a brother of the decedent (*Lely* v. *Kalinoglu,* 76 F. 2d 983; *Matter of D'Adamo,* 212 N. Y. 214; *Re Todarello,* 15 Ohio N. P. N. S. 593). Under the particular treaties and statutes there considered, these expressed preferences of local law have, in the foregoing cases, been honored.

The local law of New Jersey, however, has created no preference in favor of any person whatever. The claim of the petitioner herein is not by statute subordinated to the claim of any other person. Under these circumstances, it was a clear and gratuitous abuse of discretion for the Courts of New Jersey not to have given effect to the Consul's treaty rights as noted hereinabove (*Diamantopoulos* v. *Glekas,* 11 F. 2d 200). This petitioner should have been appointed administrator in place and stead of respondent, an undertaker's nominee and a person not having a superior interest (*Diamantopoulos* v. *Glekas,* supra).

4. The Treaty with Costa Rica, Art. IX, par. 1(a) provides that the local authorities shall notify the Consul of any national who dies in the State without representative or next of kin, and in par. 1(b) provides that, irrespective of the nationality of the decedent, the local authorities shall supply the Consul with needed information to protect the rights of his nationals who have an interest in the estate.

Had the local authorities of New Jersey so notified the Italian Consul within forty days of death, the right of the said Consul to letters of administration would have been prior, paramount and exclusive within the forty days. (New Jersey Revised Statutes 3:7-6, as amended 3A:6-4.)

Petitioner is now alleged to have lost this priority, without any fault on his part, and solely because the local authorities omitted promptly to notify the Consul of the intestate's death, or to supply needed information, as required by Treaty. The petitioner acted immediately upon acquiring notice of the intestate's death. There can be no imputation of laxity or lack of due diligence to the petitioner, under the particular circumstances of this case.

It is respectfully submitted that the local authorities herein, by a clear omission of duty with regard to notification of death or the supplying of information, deprived the petitioner herein of the specific priority and advantage to which he was entitled under the laws of New Jersey.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL MILES FINK,
Attorney for Petitioner,
37 Wall Street,
New York 5, N. Y.

APPENDIX "A"

Relevant Statutory and Treaty Provisions

New Jersey Revised Statute 3:7-6 (now 3A:6-4) provides, *inter alia,* as follows:

> "If such intestate leaves no relations justly entitled to the administration of his personal estate, or if his next of kin shall not claim the administration within forty days after the death of such intestate, the ordinary or surrogate [now 'superior court or surrogate's court'] may grant letters of administration to any fit person applying therefor."

The Consular Convention between the United States and Italy, Series No. 178, May 28, 1878, provides, *inter alia,* as follows, in Article XVII:

> "Consular Officers shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favoured nation."

The Consular Convention between the United States and Costa Rica, Treaty Series No. 2045, March 19, 1950, provides, *inter alia,* as follows:

"ARTICLE IX

"1. (a) Whenever the local authorities of the receiving state shall learn that a national of the sending state died in a locality subject to the jurisdiction of the receiving state and that there is not in the receiving state any person appointed by the decedent as his executor or as the representative of his estate or entitled to claim the whole or any part of the proceeds of the estate as his heir or next of kin or as a beneficiary under his will, such authorities shall advise the nearest consular officer of the sending state of the death of the decedent.

"(b) Whenever the local authorities of the receiving state shall learn that a decedent, irrespective of his nationality or the place of his residence, left in the receiving state property in which a person known to be a national of the sending state has an interest under the terms of the decedent's will or in accordance with the appropriate laws of descent and distribution, or in any other manner, the local authorities shall furnish the nearest consular officer of the sending state with such information as may be needed by him to protect the interests of such national.

"2(a) In any case where a deceased person leaves property in the receiving state and a legal or equitable interest in such property is held or claimed by a national of the sending state, who is not resident in the territory of the receiving state and is not legally represented there by any person, the consular officer of the sending state in whose district the estate of the decedent is being administered or, if no administration has been instituted, the property is situated, shall have the right, except as such right may be limited by Section 3 of this article, to represent such national as regards his interests in the estate or property as if valid powers of attorney had been executed by him in favor of the consular officer. If subsequently such national becomes legally represented in the territory of the receiving state and the consular officer is notified to that effect the position of the consular officer will be as if the powers of attorney had become revoked.

"(b) The provisions of subparagraph (a) of this article apply whatever the nationality of the decedent and irrespective of the place of his death.

(c) In any case where subparagraph (a) of this article applies, the consular officer shall have the right to take steps for the protection and preservation of the interests of the person whom he is entitled to represent under subparagraph (a). He shall also have the right, in any such case, to take possession of the estate or the property unless other persons, having superior interests, have taken the necessary steps to assume possession thereof. If under the law of the re-

ceiving state, a grant or order of a court is necessary for the purpose of permitting the consular officer to exercise the rights which he is entitled to exercise pursuant to this subparagraph such rights shall be recognized by the courts and any grant or order which would have been made in favor of the person whose interests are represented by the consular officer, if he had been present and applied for it, shall be made in favor of the consular officer on his application.

"(d) The consular officer shall be permitted to undertake the full administration of the estate whenever and to the same extent as a person, whose interest he represents under subparagraph (a) of this article, would have had the right to administer the estate if he had been present. If by the law of the receiving state a grant by a court is necessary, the consular officer shall have the right to apply for and to receive a grant to the same extent as the person he represents would have had, if such person had been present and applied for it. The court may, however, postpone the making of a grant of administration to the consular officer (with or without the will annexed) for such time as it thinks necessary to enable the person represented by the consular officer to be informed and to decide whether he desires to be represented otherwise than by the consular officer.

"3. A consular officer of the sending state may, on behalf of a national of the sending state who is not a resident of the receiving state, receive for transmission to such a person, through channels prescribed by the sending state, any money or property to which such person is entitled as a consequence of the death of any person. Such money or property may include, but is not limited to, shares in an estate, payments made pursuant to Workmen's Compensation laws, or any similar laws, and the proceeds of life insurance policies. The court, agency or person making the distribution shall not, however, be required to make such distribution through a consular officer. If a court, agency or person does make distribution through a consular officer, it may require him to furnish reasonable evidence of the receipt of the money or property by the person or persons entitled thereto. The authority

vested in a consular officer by this section shall be in addition to and not in limitation of the authority vested in him by previous paragraphs of this article.

"4. Whenever a consular officer shall undertake the full administration of an estate pursuant to subparagraph (d) of paragraph 2 of this article, he subjects himself in his capacity as administrator to the jurisdiction of the court making the appointment for all necessary purposes to the same extent as if he were a national of the receiving state.

"5. The provisions of this article shall be subject to any laws of, or regulations issued pursuant to law by, the receiving state providing for, or relating to, war or a national emergency."

APPENDIX "B"

CUMBERLAND COUNTY SURROGATE'S COURT.

In the Matter of the Estate of Flora Casazza.	Action for Letters of Administration Notice

To: Luigia Rossi
Next of kin and heir
of Flora Casazza, Deceased.

You are hereby notified that I, Joseph DeMarco, a creditor of Flora Casazza, late of the County of Cumberland, will, on Friday, the 20th day of April, 1951 at 10:00 A. M., make application to the Surrogate of the County of Cumberland, at the Court House in Bridgeton, New Jersey for the appointment of S. Grill D'Ippolito as administrator of the Estate of the said Flora Casazza, deceased, you having failed for more than forty (40) days from her death to make application therefor.

Joseph Adamo (signed)
Joseph Adamo,
Attorney for Joseph DeMarco.

Dated: Vineland, New Jersey
March 16, 1951.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1951. No. 631.

TURIDDO SIMONI,

Petitioner,

vs.

S. GRILL D'IPPOLITO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Supreme Court of New Jersey is reported in 8 N. J. 271.

JURISDICTION.

The judgment of the Supreme Court of New Jersey was entered on December 10, 1951 (R. 37). The petition for a writ of certiorari was filed on March 6, 1952. The jurisdiction of this court is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED.

Where an Italian citizen domiciled in New Jersey dies intestate, leaving nationals of and residents of Italy as sole next of kin, is the Italian Consul absolutely entitled to letters of administration when the New Jersey statute grants discretion to the appointing agency?

Where the Court below has rejected petitioner's request for letters of administration upon the ground that it is not filed upon behalf of the decedent's next of kin, will this Court take jurisdiction upon certiorari?

STATUTE INVOLVED.

New Jersey Revised Statutes 3:7-6 provides:

"If such intestate leaves no relations justly entitled to the administration of his personal estate, or if his next of kin shall not claim the administration within forty days after the death of such intestate, the ordinary or surrogate may grant letters of administration to any fit person applying therefor."

TREATIES INVOLVED.

The Consular Convention between the United States and Italy, Series No. 178, May 28, 1878, provides, Article XVII:

"Consular Officers shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favoured nation."

The Consular Convention between the United States and Costa Rica, Treaty Series No. 2045, March 19, 1950, provides, Article IX:

* * * * * * * *

"2 (a) In any case where a deceased person leaves property in the receiving state and a legal or equitable interest in such property is held or claimed by a national of the sending state, who is not resident in the

territory of the receiving state and is not legally represented there by any person, the consular officer of the sending state in whose district the estate of the decedent is being administered or, if no administration has been instituted, the property is situated, shall have the right, except as such right may be limited by Section 3 of this article, to represent such national as regards his interests in the estate or property as if valid powers of attorney had been executed by him in favor of the consular officer. If subsequently such national becomes legally represented in the territory of the receiving state and the consular officer is notified to that effect the position of the consular officer will be as if the powers of attorney had become revoked."

* * * * * * * *

"(d) The consular officer shall be permitted to undertake the full administration of the estate whenever and to the same extent as a person, whose interest he represents under subparagraph (a) of this article, would have had the right to administer the estate if he had been present. If by the law of the receiving state a grant by a court is necessary, the consular officer shall have the right to apply for and to receive a grant to the same extent as the person he represents would have had, if such person had been present and applied for it. The court may, however, postpone the making of a grant of administration to the consular officer (with or without the will annexed) for such time as it thinks necessary to enable the person represented by the consular officer to be informed and to decide whether he desires to be represented otherwise than by the consular officer."

STATEMENT.

Flora Casazza, widow, died intestate on December 22, 1950, leaving no next of kin in the United States, her estate consisting of real and personal property. On March 16, 1951, Joseph C. De Marco, who as undertaker, buried decedent, and whose bill for services was unpaid, made application to the Surrogate of Cumberland County for appointment of respondent as Administrator. Notice was served upon Petitioner, the Italian Consul, at Trenton, New Jersey. Petitioner filed a timely application to the Surrogate to be appointed administrator and averred that the decedent left her surviving as next of kin a Luigia Rossi, in Genoa, Italy (R. 34, 35).

Both applications were presented to the Probate Division of the Cumberland County Court, and on July 12, 1951, letters of administration were granted to respondent (R. 34).

It was discovered that Luigia Rossi, upon whose behalf petitioner acted, was not a next of kin of decedent, but that three sisters and a brother are next of kin. Petitioner's petition for letters was never amended to show these facts (R. 34).

On appeal, the Supreme Court of New Jersey, on December 10, 1951, affirmed the judgment appointing respondent administrator (R. 37).

SUMMARY OF ARGUMENT.

1. The petitioner failed to amend his petition for letters of administration so as to aver his representation of the three sisters and brother, the sole next of kin of decedent. The petition for letters of administration upon which petitioner depends avers that he represents one who is not next of kin to the decedent. The Supreme Court of New Jersey rejected the petitioner's request for letters upon this, a non-federal, ground.

2. The Costa Rica Treaty, upon which petitioner depends by virtue of the most favored nation clause of the Italian Treaty, provides that the consular representative shall be permitted to undertake the full administration of the estate whenever and to the same extent as the person whose interest he represents, assumed for this purpose to be the next of kin resident of Italy, would have the right to administer the estate if he had been present. The next of kin under the New Jersey statute for the first forty days after the death of an intestate have the sole right to apply for letters and if they fail to apply it is for the court to appoint, in its discretion, such proper person as will accept it. There is no novel question involved in this case, but the law is well established and has met with the approval of this court.

ARGUMENT.

I. *The decision of the Supreme Court of New Jersey rests upon a non-federal ground.*

The Supreme Court of New Jersey construed the New Jersey Statute (R. S. 3:7-6) to mean that for the first forty days after the death of an intestate the spouse and next of kin have the sole right to apply for letters, and if they fail to apply, it is for the court in its discretion to appoint such proper person as will accept it (R. 34-36).

The Supreme Court of New Jersey stated (R. 34) that more than forty days after the death of the intestate the funeral director made application to the Surrogate of Cumberland County for the appointment of respondent as administrator, that notice of such application was served upon the Italian Consul at Trenton, New Jersey, and that the Italian consul thereupon filed an application in the nature of a cross complaint to be appointed administrator. The court said,

> "This cross complaint charges that Flora Casazza left her surviving as her heir at law and next of kin, Luigia Rossi, a sister residing in Genoa, Italy. It was later discovered that the said Luigia Rossi was not the next of kin, nor one of the next of kin of the decedent, but, as heretofore mentioned, three sisters and a brother are the next of kin. *The record failed to disclose that the cross complaint was amended to show these facts* (R. 34). * * * There are no facts before us which convince us that there was such abuse of discretion by the court below in appointing D'Ippolito as administrator of his estate so as to require a reversal of the order" (R. 36).

Argument

The petitioner was denied relief by the New Jersey Supreme Court because his petition for appointment as administrator was not filed on behalf of the next of kin of decedent. This determination should be given conclusive effect: *De Saussure v. Gaillard*, 127 U. S. 216, 233-234; *Patterson v. Alabama*, 294 U. S. 600.

It is accordingly submitted that the petition for writ of certiorari should be denied.

II. *There is no substantial Federal question.*

Petitioner depends by virtue of the most favored nation clause on the Italian Treaty (Appendix "A" to Petition in Support) upon the treaty with Costa Rica (Appendix "A" to Petition in Support) and refers to Article 9 thereof.

Petitioner contends that because the Costa Rican Treaty, Article IX, paragraph 2(c) provides, inter alia, that the consul has the right to "take possession of the estate or the property" of the deceased national, the right to letters of administration in the consul is thereby established.

But the right to take possession of the estate does not entitle the consul to letters of administration, *Rocca v. Thompson*, 223 U. S. 317.

As a matter of fact it is obvious, upon reading the Costa Rica Treaty, that it was not intended that the grant of the right to take possession was to include the right to letters of administration. The right to letters of administration is covered by Article IX, paragraph 2(d), and it is therein stated:

> "The consular officer shall be permitted to undertake the full administration of the estate whenever and to the same extent as a person whose interest he represents, sub-paragraph (a) of this article would have had the right to administer the estate if he had been present."

Reference to sub-paragraph (a) of Article IX, paragraph 2, shows that in this case the persons whose interest petitioner represents are the next of kin, nationals and residents of Italy who hold an interest in the estate of the decedent.

Since the Consular Officer's rights to letters of administration are the same as the next of kin, the Consular Officer is bound by the same forty day provision under the New Jersey Statute as were the next of kin, and having failed to apply for letters of administration within such forty day period, it was for the Court in its discretion to appoint such proper person as it chose and would accept the grant.

Viewing the Costa Rican treaty in the proper light, there is no novel question presented in the petition. It is the same question as arose under the treaty with Sweden of 1911, where the language was "so far as the laws of each country will permit." This was construed not to require the appointment of the foreign consul as administrator, but to subject the foreign consul to the provisions of the state laws: *Matter of D'Adamo,* 212 N. Y. 214, 106 N. E. 81 (opinion by Cardoza, J.); cases collected in 100 A. L. R. 1527, 1531; *Schneider v. Hawkins,* 179 Md. 21, 16 A. 2d 861; *Lely v. Kalingolu,* 76 F. 2d 983, Cert. den. 295 U. S. 765.

In *Santovincenzo v. Egan,* 284 U. S. 30, this Court, per Hughes, C. J., referred with approval to the decision in *Matter of D'Adamo,* supra, and said:

> "We are not here concerned with questions of mere administration, nor is it necessary to determine that the loose phrasing of the provisions of Article VI precludes an appropriate local administration to protect the rights of creditors."

It is submitted that the Treaty with Costa Rica advances the rights of foreign consular officers no further than the Treaty with Sweden.

It is submitted that since there is not a substantial question involved, the petition for certiorari should be denied: *Hass v. New York*, 338 U. S. 803.

CONCLUSION.

It is submitted that it has been established that the Supreme Court of New Jersey rendered judgment against petitioner because petitioner had not applied for letters of administration upon behalf of decedent's next of kin.

It is further submitted that the question presented with respect to the rights of foreign consul to letters of administration upon estates of deceased nationals under the Costa Rican treaty renders no novel question that this Court should hear.

It is accordingly submitted that the petition for certiorari should be denied.

Respectfully submitted,

EDWIN J. McDERMOTT,
Attorney for Respondent.